UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

MATTHEW SMART,

Plaintiff,

-against-

CITY OF NEW YORK, WILFRED GUZMAN, SHEKELE MUHAMMAD, NICHOLAS PASCHITTI, JAMES PARIS, JWANN LAYTON, JOHN McCUE, and JOHN/JANE DOES Nos. 1-10 (the names John and Jane Doe being fictitious, as the true names are presently unknown to plaintiff),

Defendants.

REPORT AND RECOMMENDATION

15-CV-1405 (RRM)(PK)

Peggy Kuo, United States Magistrate Judge:

Plaintiff Matthew Smart brought this action against Defendants City of New York (the "City"), Wilfred Guzman, Shekele Muhammad, Nicholas Paschitti, James Paris, Jwann Layton, John McCue, and John/Janes Does Nos. 1-10 (Guzman, Shekele, Paschitti, Paris, Layton, and McCue, collectively, the "Individual Defendants") pursuant to 42 U.S.C. § 1983 and New York law, for violations of Plaintiff's rights under the Fourth and Fourteenth Amendments of the United States Constitution and state law. (Am. Compl., Dkt. 15.) Plaintiff is a resident of Brooklyn, New York and the events giving rise to this lawsuit occurred there. (*Id.* ¶¶ 5-7.) The Individual Defendants are members of the New York City Police Department (the "NYPD"). (*Id.* ¶¶ 9-14.) Plaintiff alleges that he was falsely arrested, subjected to excessive force, and illegally strip-searched by certain of the Individual Defendants and John/Jane Does, and that others failed to intervene when these events occurred. (*Id.*) Plaintiff also alleges that the NYPD is liable for these actions under a *Monell*[1] theory of supervisory liability. (*Id.* ¶ 56-63.) Plaintiff's lawsuit was resolved by way of an Offer of Judgment

[1] *See Monell v. Dep't of Soc. Servs.*, 436 U.S. 658 (1978).

pursuant to Rule 68 of the Federal Rules of Civil Procedure. (See Letter, Dkt. 28.) *See* Fed. R. Civ. P. 68.

Before the Court on referral from the Honorable Roslynn R. Mauskopf is Plaintiff's Motion for Attorneys' Fees and Costs. (See Dkt. 32.) For the reasons discussed below, the Court respectfully recommends that the motion be granted, and Plaintiff be awarded $70,277.36 in attorneys' fees and costs.

PROCEDURAL HISTORY

Plaintiff commenced this lawsuit by filing the Complaint on March 18, 2015 (Dkt. 1), and served Defendants City of New York, Guzman, and Muhammad[2] on March 19, 2015, April 14, 2015, and April 21, 2015 (Dkts. 4-5 & 7). The City was granted an extension of time to answer the Complaint (Order, 4/21/2015), and then sought a stay of discovery (Dkt. 8). The Motion to Stay was granted, over opposition from Plaintiff, on July 2, 2015. (Dkts. 10-11.) At an Initial Conference on August 5, 2015, the Stay was lifted (Dkt. 12); Defendants answered on October 19, 2015 (Dkt. 13). Plaintiff filed an Amended Complaint on November 27, 2015, substituting as parties the remaining Individual Defendants. (Dkt. 15.) Defendants did not answer the Amended Complaint, but the parties engaged in discovery as to the City and all of the Individual Defendants (see Min. Entry, 11/04/2015; Min. Entry, 1/13/2016; Order, 5/9/2016). The parties participated in a Settlement Conference on March 15, 2016, but were unable to reach an agreement. (See Min. Entry, 3/15/2016.) On June 8, 2016, Defendants notified the Court that Plaintiff had accepted an Offer of Judgment pursuant to Rule 68 (Dkt. 28), and the parties subsequently briefed this motion.

DISCUSSION

Pursuant to 42 U.S.C. § 1988, a district court in a § 1983 action has discretion to award to a

[2] Initially, only Shekele and Guzman were identified as Individual Defendants; the other Individual Defendants were represented as John/Jane Does. (See Compl., Dkt. 1.)

"prevailing party…a reasonable attorney's fee…" 42 U.S.C. § 1988. Defendants do not contest that Plaintiff in this action is entitled to recover attorneys' fees and costs. (See Defs.' Resp. in Opp'n, Dkt. 34.) However, Plaintiff seeks to recover $70,277.36, of which $66,787.75 is attorneys' fees and $3,489.61 is costs (Pl.'s Mot. for Att'y Fees at 2, Dkt. 32; Aff. in Support, Dkt. 36); Defendants propose an award of no more than $28,000 in fees and costs[3] (Defs.' Resp. in Opp'n at 3, Dkt. 34). Defendants object to the amount that Plaintiff seeks to recover on three grounds: (1) Plaintiff's counsel's hourly rate for attorney work; (2) the number of hours counsel billed; and (3) counsel's billing for hours expended on the instant application. (*Id.*)

I. Attorneys' Fees

The attorneys' fees and costs awarded to Plaintiff by the Court must be "reasonable." *See Riley v. City of New York*, No. 10-CV-2513 (MKB), 2015 WL 9592518, at *1 (E.D.N.Y. Dec. 31, 2015). "[T]he lodestar – the product of a reasonable hourly rate and the reasonable number of hours required by the case – creates a presumptively reasonable fee." *Millea v. Metro-N. R.R. Co.*, 658 F.3d 154, 166 (2d Cir. 2011); *see also Scharff v. Cty. of Nassau*, No. 10-CV-4208 (DRH)(GRB), 2016 WL 3166848, at *3 (E.D.N.Y. May 20, 2016), *R&R adopted*, 2016 WL 3172798 (E.D.N.Y. June 6, 2016); *Riley*, 2015 WL 9592518, at *1. To calculate the lodestar, the Court determines a reasonable hourly rate and a reasonable number of hours. "District courts have broad discretion to determine both the reasonable number of compensable hours and the reasonable hourly rate." *Brady v. Wal-Mart Stores, Inc.*, 455 F. Supp. 2d 157, 203 (E.D.N.Y. 2006). The party applying for fees must provide contemporaneous time sheets to document counsel's work, and must support the hourly rates it claims with, for example, evidence of counsel's expertise and prevailing market rates. *See*

[3] The sum of $28,000 proposed by Defendants does not reflect a proper calculation of what Defendants actually argue in their response. Defendants propose that Plaintiff's counsel's billed hours for attorney work be reduced to 120 and that counsel's hourly rate for attorney work be $300. (Defs.' Resp. in Opp'n at 2-3, Dkt. 34.) The result would be an award of $36,000 in attorneys' fees alone, exclusive of uncontested amounts of $2,987.75 in administrative and travel time as well as $3,489.61 in costs.

Riley, 2015 WL 9592518, at *1. Here, Plaintiff has supplied attorney time sheets (Dkts. 32-1 & 36), an invoice for costs (Dkt. 32-1 at 17), counsel's professional biographical details (see Pl.'s Mot. for Att'y Fees at 3, Dkt. 32; Pl.'s Reply at 1-2, Dkt. 35), and evidence of prevailing market rates (see Pl.'s Mot. for Att'y Fees at 3, Dkt. 32).

A. *Hourly Rate*

To determine a reasonable hourly rate, the district court considers "rates prevailing in the community for similar services by lawyers of reasonably comparable skill, expertise and reputation." *Cruz v. Local Union No. 3 of IBEW*, 34 F.3d 1148, 1159 (2d Cir. 1994). The "community" is the district in which the reviewing court sits. *Scharff*, 2016 WL 3166848, at *4 (internal quotations and brackets omitted). "The reasonable hourly rate is the rate a paying client would be willing to pay…bear[ing] in mind that a reasonable, paying client wishes to spend the minimum necessary to litigate the case effectively." *Arbor Hill Concerned Citizens Neighborhood Ass'n v. Cty. of Albany*, 522 F.3d 182, 190 (2d Cir. 2008). The district court must also "bear in mind *all* of the case-specific variables that [the Second Circuit] and other courts have identified as relevant to the reasonableness of attorney's fees in setting a reasonable hourly rate." *Id.* at 190 (emphasis in the original). Those factors include the attorney's experience and expertise and the overall success achieved in the case. *See Brady*, 455 F. Supp. 2d at 204; *Chen v. Cty. of Suffolk*, 927 F. Supp. 2d 58, 71 (E.D.N.Y. 2013). The fee applicant has the burden of justifying the requested rate as reasonable. *See Scharff*, 2016 WL 3166848, at *4.

In recent years, fees have been awarded in the Eastern District of New York at an hourly rate of $300 to $450 for partners and $100 to $325 for associates in civil rights cases. *See, e.g.*, *John v. Demaio*, No. 15-CV-6094 (NGG)(CLP), 2016 WL 7469862, at *6 (E.D.N.Y. Sept. 29, 2016), *R&R adopted*, 2016 WL 7410656 (E.D.N.Y. Dec. 22, 2016); *Volpe v. Nassau Cty.*, No. 12-CV-2416 (JFB)(AKT), 2016 WL 6238525, at *6 (E.D.N.Y. Oct. 24, 2016); *Anderson v. Cty. of Suffolk*, No. 09-

CV-1913 (GRB), 2016 WL 1444594, at *4-5 (E.D.N.Y. Apr. 11, 2016); *Chen*, 927 F. Supp. 2d at 72; *Mariani v. City of New York*, No. 12-CV-288 (NG)(JMA), 2013 WL 11312399, at *1 (E.D.N.Y. July 1, 2013); *Blount v. City of New York*, No. 11-CV-124 (BMC), 2011 WL 8174137, at *1 (E.D.N.Y. Aug. 12, 2011).

Plaintiff was represented in this action by attorney Robert T. Perry ("Perry"), a solo practitioner located in Brooklyn, New York. (Pl.'s Mot. for Att'y Fees at 1, Dkt. 32.) He has practiced law for 43 years. (*Id.* at 3.) Although he began his practice with the Federal Communications Commission, his caseload has included prominent civil rights cases since he entered private practice in 1992, and he was also affiliated with the Center for Constitutional Rights for six years. (*Id.*) He requests an hourly rate of $400 for his attorney work, and discounted rates of $200 per hour for travel time and $125 per hour for administrative work. (*Id.* at 2.)

Defendants contest the attorney work rate only. (See Defs.' Resp. in Opp'n at 1-2, Dkt. 34.) While acknowledging that Perry has substantial legal experience, they contend that he has only been handling police misconduct cases since 2008, and that a rate of $300 per hour is therefore appropriate. (*Id.* at 2.) *Blue v. Finest Guard Servs., Inc.*, No. 09-CV-133 (ARR), 2010 WL 2927398 (Jun. 24, 2010). However, Perry's more than 40 years of litigation experience, including seven years specifically on police misconduct cases at the time the Complaint was filed, warrants a higher rate. Furthermore, Perry also litigated in the related area of civil rights law for many years before 2008 (see Pl.'s Mot. for Att'y Fees at 3, Dkt. 32; Pl.'s Repl. at 2, Dkt. 35), gaining expertise relevant to the instant action even though his focus may not have been specifically on police misconduct-related civil rights cases. *See A.R. ex rel. R.V. v. N.Y.C. Dep't of Educ.*, 407 F.3d 65, 82 (2d Cir. 2005). His requested rate of $400 per hour falls within the range of rates recognized as reasonable in the Eastern District of New York, and the Court respectfully recommends that it be found reasonable in this case.

B. *Hours Billed*

"[T]he district court should exclude excessive, redundant or otherwise unnecessary hours…." *Quaratino v. Tiffany & Co.*, 166 F.3d 422, 425 (2d Cir. 1999). Defendants object to 27 of the hours billed. (Defs.' Resp. in Opp'n at 2-3, Dkt. 34.) However, Defendants point to only two examples of excessive billing that together do not total 27 hours, and, moreover, the hours of which Defendants complain seem to have been calculated incorrectly. For example, Defendants complain that counsel spent 11 hours drafting the Complaint, but by the Court's calculation from counsel's detailed contemporaneous time records, counsel in fact spent 7 hours and 45 minutes. (See Time Records at 2-3, Dkt. 32-1.) Similarly, Defendants state that counsel spent 15 hours on Plaintiff's settlement statement, when in fact it appears that counsel spent 12 hours and 45 minutes. (See *id.* at 12-13.) In any event, the undersigned is unpersuaded by these objections. The Court also notes that Defendants chose not to make the Rule 68 Offer until after the majority of discovery was completed, including depositions of five individual defendants. (See Pl.'s Mot. for Att'y Fees at 2, Dkt. 32.) Accordingly, the undersigned does not recommend reducing counsel's billed hours.

C. *Fee Application Hours*

Defendants argue that Plaintiff is not entitled to recover fees for time spent on the instant application, both because they post-date the acceptance of the Rule 68 Offer and because they constitute "fees on fees." (Defs.' Resp. in Opp'n at 3, Dkt. 34.) However, "a party that has been awarded attorneys' fees is generally entitled to recover the reasonable cost of making a fee application." *Demaio*, 2016 WL 7469862, at *11; *accord*, *Anderson*, 2016 WL 1444594, at *9. And some courts in this circuit permit reasonable fees associated with a fee application regardless of the time limitation apparently imposed by the Rule 68 Offer. *See, e.g.*, *Demaio*, 2016 WL 7469862, at *11; *Anderson*, 2016 WL 1444594, at *9. "By not settling the attorneys' fees issue [in the Rule 68 Offer], defendant was put on notice that time spent by counsel in seeking fees would become a component of 'reasonable attorneys' fees.'" *Demaio*, 2016 WL 7469862, at *11 (brackets omitted). Moreover, the parties convened for a settlement conference at which a settlement agreement could have been negotiated inclusive of attorneys' fees, but was not. The Court respectfully recommends that Plaintiff be entitled to recover for hours spent on the instant application. Counsel reports spending 12 hours and 30 minutes on the motion (see Dkt. 36), which the Court respectfully recommends be found reasonable. *See Anderson*, 2016 WL 1444594, at *9.

The presumptively reasonable fee is therefore recommended as $66,787.75, which the Court respectfully recommends should not be further adjusted.

II. Costs

Plaintiff also seeks an award of costs, much of it for reporters for the depositions of five of the Individual Defendants. Counsel has provided an invoice documenting the costs (Dkt. 32-1 at 17), and Defendants do not appear to object. The Court therefore recommends as reasonable the requested costs for the filing fee ($400.00), service of process ($248.00), copies ($148.10), obtaining medical records ($138.53), mailing ($19.33), and court reporters for depositions ($2,535.65), for the requested total of $3,489.61.

CONCLUSION

Based on the foregoing, the Court respectfully recommends that Plaintiff's fee application be granted, and that Plaintiff be awarded $70,277.36[4] in attorneys' fees and costs. Plaintiff is directed to serve a copy of this Report and Recommendation on Defendants by certified mail.

Any objection to this Report and Recommendation must be filed in writing with the Clerk of Court within fourteen (14) days of service. 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b). Failure to timely file any such objection waives the right to further judicial review of this Report and Recommendation. *Caidor v. Onondaga Cty.*, 517 F.3d 601, 604 (2d Cir. 2008).

---

[4] $66,787.75 + $3,489.61 = $70,277.36.

Dated: Brooklyn, New York
February 17, 2017

SO ORDERED:

Peggy Kuo
PEGGY KUO
United States Magistrate Judge